

Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	
	)	Bankruptcy Case
ROBERT RAYMOND CANCELOSI	)	No. 10-30182-rld7
REBEKAH MALIA CANCELOSI,	)	
	)	
Debtors.	)	
_____	)	
	)	
RICHARD H. WILKES and BEVERLEE J.	)	
WILKES,	)	
	)	Adv. Proc. No. 10-03099-rld
Plaintiffs,	)	
	)	MEMORANDUM OPINION
v.	)	
	)	
ROBERT RAYMOND CANCELOSI, III,	)	
	)	
Defendant.	)	
_____	)	

On June 24, 2011, I conducted the trial ("Trial") on stipulated facts of the Complaint ("Complaint") of Beverlee J. Wilkes and Richard H. Wilkes ("the Wilkes") to except their claim against debtor Robert Raymond Cancelosi III ("Mr. Cancelosi") from discharge pursuant to §§ 523(a)(4)

1 and (19) of the Bankruptcy Code.<sup>1</sup> Following argument from the parties, I  
2 stated oral findings of fact and conclusions of law on the record and  
3 found in favor of the Wilkes on their § 523(a)(19) claim and dismissed  
4 their § 523(a)(4) claim. I prepared and entered a judgment ("Judgment")  
5 in favor of the Wilkes on June 27, 2011.

6 On July 11, 2011, Mr. Cancelosi filed Defendant's Post-Judgment  
7 Omnibus Motions ("Motion") requesting four types of relief: 1) that the  
8 Judgment be altered or amended, or in the alternative, for a new trial  
9 pursuant to Civil Rule 59 and Rule 9023; 2) a precautionary motion to  
10 confirm the Motion's status as a tolling motion for purposes of extending  
11 the time for filing a notice of appeal pursuant to Rule 8002; 3) that  
12 enforcement of the Judgment be stayed pending disposition of the Motion  
13 pursuant to Civil Rule 62(b) and Rule 7062; and 4) that enforcement of  
14 the Judgment be stayed pending appeal, pursuant to Civil Rule 62(d) and  
15 Rule 7062. The Wilkes filed a Response ("Response") to the Motion on  
16 July 20, 2011. I heard argument on the Motion at a hearing ("Hearing")  
17 on July 26, 2011, and took determination of the Motion under advisement.

18 Since the Hearing, I have considered carefully the arguments  
19 presented by the parties, the Motion and the Response, the exhibits  
20 ("Exhibits") admitted at the Trial, and applicable authorities. I  
21 further take judicial notice of the docket and documents filed in this  
22 adversary proceeding ("Adversary Proceeding") and in Mr. Cancelosi's main  
23 chapter 7 case, Case No. 10-30182 ("Main Case"), for purposes of

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24  
25 <sup>1</sup> Unless otherwise indicated, all chapter and section references are  
26 to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references  
are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 confirming and ascertaining facts not reasonably in dispute. Federal  
2 Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa.  
3 2006).

4 In light of that consideration and review, this Memorandum  
5 Opinion sets forth the court's findings and conclusions under Civil Rule  
6 52(a), applicable with respect to the Motion under Rule 7052.

#### 7 8 Factual Background

9 Although the parties differ substantially in their  
10 interpretations of how relevant facts apply in this Adversary Proceeding,  
11 the underlying facts are not in dispute.

12 Mr. Cancelosi and his wife, Rebekah Malia Cancelosi  
13 ("Ms. Cancelosi"), filed for relief under chapter 7 of the Bankruptcy  
14 Code on January 12, 2010. Main Case Docket No. 1. Prior to the  
15 Cancelosis' bankruptcy filing, the Wilkes had initiated an arbitration  
16 proceeding ("Arbitration") in 2008 against Mr. Cancelosi, Bret Costelow  
17 ("Mr. Costelow"), and Acuity Lending Corp. ("Acuity Lending"), of which  
18 Mr. Cancelosi was president and a 50% shareholder, alleging fraud and  
19 securities law violations, among other things. See Complaint, Adversary  
20 Proceeding Docket No. 1. The deadline to file adversary proceeding  
21 complaints to except claims from the Cancelosis' discharge was April 12,  
22 2010. Main Case Docket No. 4. The Wilkes timely filed the Complaint on  
23 April 5, 2010 against both Mr. Cancelosi and Ms. Cancelosi.

24 In the Complaint, after describing the pending Arbitration and  
25 the claims asserted therein, the Wilkes requested that their claim be  
26 excepted from the Cancelosis' discharge pursuant to §§ 523(a)(4) and

1 (19). See Adversary Proceeding Docket No. 1. Ms. Cancelosi moved to  
2 dismiss the Complaint against her for failure to state a claim upon which  
3 relief could be granted by motion ("Motion to Dismiss") filed on May 5,  
4 2010. See Adversary Proceeding Docket No. 6. I granted the Motion to  
5 Dismiss by order entered on May 26, 2010. See Adversary Proceeding  
6 Docket No. 11. The Wilkes do not contest that ruling.

7 In the meantime, Mr. Cancelosi filed an answer to the Complaint  
8 (see Adversary Proceeding Docket No. 5), and an initial pretrial  
9 conference in the Adversary Proceeding was held on May 25, 2010. See  
10 Adversary Proceeding Docket No. 9. At the initial pretrial conference,  
11 after discussing with Ms. Wilkes and counsel for the Cancelosis the most  
12 efficient and cost-effective way to proceed to resolve the Adversary  
13 Proceeding, I granted relief from stay to allow the Arbitration to  
14 proceed and scheduled a further pretrial conference for August 10, 2010.  
15 Id. On May 28, 2010, I entered an order granting relief from stay to  
16 allow the Arbitration to proceed, effective immediately. See Adversary  
17 Proceeding Docket No. 12.

18 Ultimately, an evidentiary hearing in the Arbitration took  
19 place on November 30-December 1, 2010, and the arbitrator's Award  
20 ("Award") was issued on January 18, 2011. See Exhibit A. In the Award,  
21 the arbitrator discussed and decided three claims:

22 1) Sale of Securities

23 In the Award, after discussing the nature of the subject  
24 transactions, the arbitrator found that all three Respondents (Mr.  
25 Cancelosi, Mr. Costelow and Acuity Lending) had sold unregistered  
26 securities, with no credible evidence that the subject sales were exempt

1 from registration under Oregon's "Blue Sky" laws. The arbitrator further  
2 found that the Respondents were "jointly and severally liable for the  
3 damages resulting from those sales." See Award, Exhibit A at pp. 1-3.

4 2) Breach of Fiduciary Duties

5 While the arbitrator found that the Respondents had breached  
6 fiduciary duties, specifically finding that Mr. Cancelosi had "either  
7 direct or imputed knowledge" of the subject breaches, no separate damages  
8 were proven, and any recoverable amounts would be payable to Acuity  
9 Lending rather than to the Wilkes. See Award, Exhibit A at pp. 3-4.

10 3) Breach of Contract

11 The arbitrator further found that Mr. Cancelosi was liable on a  
12 \$160,000 payment guarantee to the Wilkes. See Award, Exhibit A at p. 4.

13 4) Damages

14 The arbitrator discussed damages separately. Under ORS  
15 59.115(2), as noted by the arbitrator, the party damaged as a result of a  
16 violation of the Oregon securities laws has two recovery options:

- 17 (a) Upon tender of the security, the consideration  
18 paid for the security, and interest from the date of  
19 payment equal to the greater of the rate of interest  
20 specified in ORS 82.010 for judgments for the payment  
21 of money or the rate provided in the security if the  
22 security is an interest-bearing obligation, less any  
23 amount received on the security; or  
24 (b) If the purchaser no longer owns the security,  
25 damages in the amount that would be recoverable upon a  
26 tender, less the value of the security when the  
purchaser disposed of it and less interest on such  
value at the rate of interest specified in ORS 82.010  
for judgments for the payment of money from the date  
of disposition.

25 The arbitrator found that the Wilkes retained the subject securities and  
26 were attempting to recover from their disposition in mitigation of their

1 damages. See Award, Exhibit A at p. 5. The Wilkes had claimed damages  
2 with respect to their investments in a total amount of \$767,353.42  
3 without contradiction from the Respondents. Accordingly, the arbitrator  
4 found that the Wilkes' damages from the Respondents' violations of the  
5 Oregon securities laws totaled \$767,353.42. Id. at 5. The arbitrator  
6 noted,

7 Prior to entry of judgment the [Wilkes] are required  
8 to tender the securities to Respondents in order to  
9 recover their damages. Metal Tech Corp. v. Metal  
10 Technologies Co., Inc., 74 Or. App. 297, 302 (1985).  
If they intend to hold the securities, they do so at  
their own risk and are not entitled to a recovery for  
the Oregon Securities Law violation.

11 Id. The arbitrator further noted, however,

12 Since the alternate theory of liability results in  
13 damages that are duplicative of the damages resulting  
14 from the breach of the securities law, they are  
15 included in the final damage award upon a tender.  
Absent a tender, the alternate liability theory would  
apply.

16 Id. (Emphasis added.)

17 The following "Award" is short:

18 For the foregoing reasons, an Award is entered in  
19 favor of the [Wilkes] and against the individual  
20 Respondents, jointly and severally, in the amount of  
\$767,353.42, plus interest from the date of this  
Award, conditioned on tendering the securities in  
question to the Respondents prior to the entry of  
21 judgment on this Award. If the [Wilkes] elect not to  
22 tender, an Award will be entered in their favor in the  
amount of \$160,000 against the Respondent Cancelosi.

23 Id. at 6.

24 On January 21, 2011, Ms. Wilkes filed a copy of the Award with  
25 the court. See Adversary Proceeding Docket No. 23. At a further  
26 pretrial conference on March 8, 2011, it was noted that no Circuit Court

1 judgment yet had been entered confirming the Award, and a schedule for  
2 trial on the issue of damages only was discussed. See Adversary  
3 Proceeding Docket No. 27. A scheduling order subsequently was entered  
4 scheduling the trial for May 25, 2011. See Adversary Proceeding Docket  
5 No. 28.

6 The Trial ultimately was set over to June 24, 2011 to  
7 accommodate the Multnomah County Circuit Court's ("Circuit Court")  
8 schedule for entry of a judgment confirming the Award. See Adversary  
9 Proceeding Docket Nos. 30 and 31. On or about June 10, 2011, the Circuit  
10 Court entered a General Judgment and Money Award ("Confirming Judgment"),  
11 noting 1) that the Award had been presented to the Circuit Court for  
12 confirmation, and 2) that the Wilkes had not tendered the subject  
13 securities to the Respondents, and 3) awarding judgment in favor of the  
14 Wilkes against Mr. Cancelosi in the amount of \$160,000 to bear interest  
15 from the date of entry of the Confirming Judgment at the rate of 9% per  
16 annum. See Exhibit D at pp. 1-2.

17 As noted above, the Trial was duly held on June 24, 2011, and  
18 after hearing argument from the parties in light of the admitted  
19 Exhibits, I dismissed the Wilkes' claim under § 523(a)(4) but found in  
20 their favor on their claim under § 523(a)(19). In the Judgment, I  
21 formally dismissed the § 523(a)(4) claim and awarded the Wilkes judgment  
22 against Mr. Cancelosi excepted from his discharge under § 523(a)(19) in  
23 the amount of \$160,000 plus 9% interest, as provided in the Confirming  
24 Judgment, with the following limitation:

25 [T]o the extent that the [Wilkes] recover from the  
26 disposition of the subject securities and/or other  
respondents in the underlying arbitration an amount of

1 the \$767,353.42 arbitration award that would leave  
2 less than the judgment of \$160,000 plus 9% interest  
3 owing on the [Wilkes'] claim excepted from [Mr.  
Cancelosi's] discharge, [Mr. Cancelosi] will receive a  
dollar for dollar offset.

4 Judgment, Adversary Proceeding Docket No. 48 at p. 2.

5 As noted above, I heard argument on the Motion in light of the  
6 Response on July 26, 2011, and took the matter under advisement.

7  
8 Jurisdiction

9 I have core jurisdiction to hear and resolve the Adversary  
10 Proceeding generally and the Motion specifically under 28 U.S.C. §§ 1334  
11 and 157(b)(2)(B) and (I).

12 Preliminary Matters

13 As noted at the outset, the Motion requests a number of  
14 different forms of relief, some of which I addressed at the Hearing. My  
15 dispositions as to matters allowing for summary determination are as  
16 follows:

17 A) Precautionary Motion to Extend the Time to File a Notice of Appeal.

18 Rule 8002(b) provides that,

19 If any party makes a timely motion of a type specified  
20 immediately below, the time for appeal for all parties  
21 runs from the entry of the order disposing of the last  
22 such motion outstanding. This provision applies to a  
timely motion: . . . (2) to alter or amend the judgment  
under Rule 9023; (3) for a new trial under Rule 9023 .  
. . .

23 In fact, the Motion included motions to alter or amend the Judgment or in  
24 the alternative, for a new trial under Civil Rule 59 and Rule 9023. The  
25 deadline for filing such motions under Rule 9023 is "no later than 14  
26 days after entry of judgment."



1           The Judgment was entered on June 27, 2011. The Motion was  
2 filed on July 11, 2011, 14 days later. I find that the Motion was filed  
3 timely for purposes of tolling the running of the 14-day period to file a  
4 notice of appeal under Rule 8002(a). Accordingly, the time to file a  
5 notice of appeal does not begin to run until I have entered an order  
6 fully resolving the Motion. Since Rule 8002(b) so provides, no further  
7 order is required to implement its tolling effect.

8 B) Motion for Stay of Proceedings to Enforce the Judgment Pending  
9 Disposition of the Motion.

10           In order to maintain the status quo while I considered the  
11 Motion, at the Hearing, I granted Mr. Cancelosi's motion to stay  
12 enforcement of the Judgment pending a decision on the Motion, pursuant to  
13 Civil Rule 62(b), as applicable under Rule 7062. I entered an  
14 implementing stay order on July 28, 2011. In light of the limited period  
15 contemplated between the Hearing and my entry of the under advisement  
16 disposition of the Motion, I did not require, and I do not require  
17 Mr. Cancelosi to put up any security or bond during the period of the  
18 stay, which will terminate upon entry of an order fully deciding the  
19 Motion.

20 C) Motion for Stay Pending Appeal without Bond.

21           Since the decision of any party to appeal the Judgment and/or  
22 any order deciding the Motion will be made only after I have decided the  
23 Motion, the motion for stay pending appeal pursuant to Civil Rule 62(d)  
24 and Rule 7062 is premature, and I decline to consider it at this time.

25 D) Motion for New Trial.

26           At the hearing, I confirmed with the parties that neither side

1 had any additional exhibits to submit, and neither party suggested that  
2 additional testimony was required or appropriate. Accordingly, the  
3 issues raised by the Motion concerning altering or amending the Judgment  
4 can be resolved as a matter of law, based on the evidence presented  
5 through the already-admitted Exhibits. In these circumstances, I will  
6 deny the motion for new trial and will rely on the evidentiary record  
7 from the Trial in analyzing and deciding the remaining issues presented  
8 for my consideration in the Motion.

9 The unresolved issues presented by the Motion and the Response  
10 are dealt with in the following Discussion.

#### 12 Discussion

##### 13 1) Standards for Deciding a Motion to Alter or Amend the Judgment

14 As recognized by Mr. Cancelosi, a motion to alter or amend a  
15 judgment "should not be granted absent highly unusual circumstances,  
16 unless the . . . [trial] court is presented with newly discovered  
17 evidence, committed clear error, or if there is an intervening change in  
18 the controlling law." McDowell v. Calderon, 197 F.3d 1253, 1255 (9th  
19 Cir. 1999) (quoting 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665  
20 (9th Cir. 1993), emphasis added by McDowell). See Brown v. Wright, 588  
21 F.2d 708, 710 (9th Cir. 1978) ("There are three grounds for granting new  
22 trials in court-tried actions under [Civil] Rule 59(a)(2): (1) manifest  
23 error of law; (2) manifest error of fact; and (3) newly discovered  
24 evidence."); Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 73 (9th Cir.  
25 BAP 1995).

26 In the Motion, Mr. Cancelosi does not contend that he has any

1 "newly discovered evidence" to present that would justify altering or  
2 amending the Judgment. Rather, Mr. Cancelosi argues that the Judgment is  
3 infected with "clear error," without necessarily specifying whether the  
4 error is factual, a matter of law, or both. I disagree that the Judgment  
5 is flawed by any clear error of fact or law for the following reasons.

6 2) Exceptions to Discharge and § 523(a)(19)

7 Mr. Cancelosi argues that I erred in not giving sufficient  
8 deference to the principle that exceptions to discharge should be  
9 construed narrowly. I recognize that the statutory exceptions to  
10 discharge generally are to be construed strictly in favor of the debtor  
11 and strictly against those seeking to except debts from the debtor's  
12 discharge. See, e.g., Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154  
13 (9th Cir. 1992). However, application of that principle is leavened by  
14 the relatively lenient preponderance of the evidence burden of proof  
15 standard applying with respect to such claims since the Supreme Court's  
16 decision in Grogan v. Garner, 498 U.S. 279 (1991), and by the terms of  
17 the particular exception to discharge invoked.

18 Section 523(a)(19) provides an exception to discharge for  
19 claims resulting from violations of federal and/or state securities  
20 laws.<sup>2</sup> It was adopted as part of the Sarbanes-Oxley Act of 2002

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21  
22 <sup>2</sup> Section 523(a)(19) specifically provides a chapter 7 discharge  
23 does not discharge an individual debtor from any debt that

24 (A) is for-(i) the violation of any of the Federal securities  
25 laws (as that term is defined in Section 3(a)(47) of the  
26 Securities Exchange Act of 1934), any of the State securities  
laws, or any regulation or order issued under such Federal or  
State securities laws; or (ii) common law fraud, deceit, or  
(continued...)

1 ("Sarbanes-Oxley"), the purpose of which is "to protect investors by  
2 improving the accuracy and reliability of corporate disclosures made  
3 pursuant to the securities laws, and for other purposes." Pub. L. No.  
4 107-204, 116 Stat. 745 (2002).

5 Title VIII of Sarbanes-Oxley is entitled "The Corporate and  
6 Criminal Fraud Accountability Act of 2002" (the "Accountability Act").  
7 The purposes of the Accountability Act are:

8 To provide for criminal prosecution and enhanced  
9 penalties of persons who defraud investors in publicly  
10 traded securities or alter or destroy evidence in  
11 certain Federal investigations, to disallow debts  
12 incurred in violation of securities fraud laws from  
being discharged in bankruptcy, to protect  
whistleblowers who report fraud from retaliation by  
their employers, and for other purposes.

13 S. Rep. No. 107-146, at 2 (2002) (emphasis added). Section 803 of the  
14 Accountability Act added § 523(a)(19) to the Bankruptcy Code to "[a]mend  
15 the Bankruptcy Code to make judgments and settlements based upon  
16 securities law violations nondischargeable, protecting victims' ability  
17 to recover their losses." 148 Cong. Rec. S11787 (daily ed. March 12,  
18 2002) (statement of Senator Leahy). The related Senate Committee Report  
19 states:

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20  
21 <sup>2</sup>(...continued)  
22 manipulation in connection with the purchase or sale of any  
23 security; and  
24 (B) results, before, on, or after the date on which the  
25 petition was filed, from-(i) any judgment, order, consent  
26 order, or decree entered in any Federal or State judicial or  
administrative proceeding; (ii) any settlement agreement  
entered into by the debtor; or (iii) any court or  
administrative order for any damages, fine, penalty, citation,  
restitutionary payment, disgorgement payment, attorney fee,  
cost, or other payment owed by the debtor.

1 Current bankruptcy law may permit such wrongdoers to  
2 discharge their obligations under court judgments or  
3 settlements based on securities fraud and other  
4 securities violations. This loophole in the law  
5 should be closed to help defrauded investors recoup  
6 their losses and to hold accountable those who violate  
7 securities laws after a government unit or private  
8 suit results in a judgment or settlement against the  
9 wrongdoer.

10 S. Rep. No. 107-146 (2002).

11 The legislative history of § 523(a)(19) emphasizes its remedial  
12 purpose and intended broad application. See, e.g., Smith v. Gibbons (In  
13 re Gibbons), 289 B.R. 588, 593 (Bankr. S.D.N.Y. 2003). In his section by  
14 section analysis of the Accountability Act, Senator Leahy stated:  
15 "[Section 523(a)(19)] is meant to prevent wrongdoers from using the  
16 bankruptcy laws as a shield and to allow defrauded investors to recover  
17 as much as possible." 148 Cong. Rec. S7418 (daily ed. July 26, 2002)  
18 (statement of Senator Leahy). His section by section analysis was  
19 adopted as legislative history for the Accountability Act "in order to  
20 provide guidance in the legal interpretation of these provisions of Title  
21 VIII of H.R. 2673." Id.

22 As relevant to the Complaint in this Adversary Proceeding, the  
23 Wilkes bore the burden of proof to establish each of two elements by a  
24 preponderance of the evidence: 1) their claim was for a debt resulting  
25 from a violation(s) of state securities laws; and 2) the subject debt  
26 resulted from a "judgment, order, consent order or decree in a federal or  
state judicial or administrative proceeding or any settlement agreement  
entered by the debtor or any court or administrative order for the  
payment of damages, a fine, penalty, citation, restitutionary payment,  
disgorgement payment, attorney fee, cost or other payment owed by the

debtor." Peterman v. Whitcomb (In re Whitcomb), 303 B.R. 806, 810 (Bankr. N.D. Ill. 2004). See also Mollago v. Tills (In re Tills), 419 B.R. 444, 451 (Bankr. S.D. Cal. 2009); Hodges v. Buzzeo (In re Buzzeo), 365 B.R. 578, 582 (Bankr. W.D. Pa. 2007). While Mr. Cancelosi does not contest the finding of fact in the Award that Mr. Cancelosi and the other Respondents violated Oregon's securities laws by selling unregistered securities in nonexempt transactions, Mr. Cancelosi argues that I clearly erred in my interpretation and application of the Confirming Judgment.

3) The Confirming Judgment is a General Judgment Not Limited by its Terms to Breach of Contract

Mr. Cancelosi argues both frequently and fervently that the Judgment is in error because the underlying Confirming Judgment is "only for breach of contract." See Motion, Adversary Proceeding Docket No. 52 at pp. 3, 4, 5 and 7. The fundamental problem with that argument is it is inconsistent with the terms of the Confirming Judgment.

The title of the Confirming Judgment is "General Judgment and Money Award." The Confirming Judgment notes that the Award had been presented to the Circuit Court for confirmation. The Confirming Judgment further notes that the Wilkes did not tender the securities that were the subject of the Arbitration to the Respondents. The Confirming Judgment then recognizes that the Wilkes "should have and recover judgment against" Mr. Cancelosi, and it awards a judgment in the amount of \$160,000 to the Wilkes against Mr. Cancelosi with interest at 9% from the date of entry of the Confirming Judgment. The Confirming Judgment is a general money judgment that never mentions "breach of contract" at any point.

1           It is Mr. Cancelosi rather than this court who then "goes  
2 behind" the Confirming Judgment to the findings of the arbitrator in the  
3 Award to link the \$160,000 damages amount to the arbitrator's breach of  
4 contract findings.<sup>3</sup> However, in doing so, Mr. Cancelosi runs straight  
5 into the arbitrator's further finding that "the alternate theory of  
6 liability results in damages that are duplicative of the damages  
7 resulting from the breach of the securities law." See Exhibit A at p. 5.  
8 None of the arbitrator's findings in the Award are repudiated in the  
9 Confirming Judgment.

10           Section 523(a)(19) provides a claim for relief under federal,  
11 not state, law to except a debt from a debtor's discharge. Analyzing the  
12 claim as such is appropriate since Mr. Cancelosi seeks to discharge the  
13 Confirming Judgment debt as a breach of contract claim, a remedy that  
14 would not be available to him under Oregon state law.

15           Under § 101(12), the term "debt" is defined as "liability on a  
16 claim." The debt in this case arises from the Confirming Judgment  
17 awarding a general judgment to the Wilkes of \$160,000 plus 9% interest  
18 against Mr. Cancelosi. The Confirming Judgment does not state that the

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19  
20           <sup>3</sup> Mr. Cancelosi also argues that the Wilkes recognized that the  
21 Confirming Judgment "was found . . . in Breach of Contract," citing the  
22 Wilkes' Motion to Allow Exception from Discharge, Adversary Proceeding  
23 Docket No. 38 at p. 1, ¶ 2. I note that the Wilkes have appeared pro se  
24 throughout the Adversary Proceeding, and I interpret their statements in  
25 pleadings as those of laymen. In the Ninth Circuit, pleadings from pro  
26 se parties are to be construed liberally. See Beaty v. Schiro, 554 F.3d  
780, 783 (9th Cir. 2004). I further note that in the pleadings included  
in Adversary Proceeding Docket No. 38, the Wilkes clearly argue that any  
claim for breach of contract is tied to their claims with respect to  
sales of securities. Mr. Cancelosi does not argue that the Wilkes are  
estopped from pursuing their claim under § 523(a)(19) by any admissions  
in their pleadings.

1 money judgment award is based solely on a breach of contract claim. In  
2 light of the arbitrator's finding that the Wilkes' breach of guarantee  
3 damages were duplicative of a portion of the Wilkes' breach of securities  
4 law damages, the Circuit Court's failure to include such a limitation in  
5 the Confirming Judgment is appropriate.

6         Particularly relevant to the circumstances I face in this case  
7 is the decision in Voss v. Pujdak (In re Pujdak), \_\_\_ B.R. \_\_\_, 2011 WL  
8 2619506 (Bankr. D.S.C. June 30, 2011). In Pujdak, the Greenville County,  
9 South Carolina Court of Common Pleas ("Court") entered a judgment in  
10 favor of the plaintiff after imposing terminating sanctions for discovery  
11 abuses on the defendants. Id. at \*1. In its findings, the Court found  
12 that the defendants had caused damages to the plaintiff in the amount of  
13 \$41,541.96 plus \$1,288.72 (a total of \$42,830.68) based on, among other  
14 things, the defendants' violations of the SC Securities Act, SC Code 35-  
15 1-509, and the SC Unfair Trade Practices Act ("SCUTPA"). Id. at \*2.

16         However, in terms of recovery, Plaintiff can only  
17 recover under one theory of damages. Plaintiff elects  
18 recovery under SCUTPA. Under the SCUTPA claim,  
19 specifically SC Code 39-5-140, Plaintiff is entitled  
20 to a trebling of damages, and costs and attorney fees.  
21 Damages are awarded in the amount of \$128,492.04.

22 Id.

23         The Pujdaks subsequently filed for relief under chapter 7, and  
24 the plaintiff filed an adversary proceeding against them under  
25 §§ 523(a)(2)(A) and (a)(19). Id. Ultimately, the bankruptcy court  
26 excepted the Pujdaks' debt to the plaintiff from discharge under  
§ 523(a)(19) to the extent of \$42,830.68 (including the amount of damages  
not trebled) in spite of the plaintiff's election of her remedy under



1 SCUTPA in the Court's judgment.

2 Based on the foregoing analysis, I conclude that I committed no  
3 "clear error" in excepting the Wilkes' claim in the amount of \$160,000  
4 plus 9% interest from Mr. Cancelosi's discharge pursuant to § 523(a)(19),  
5 based on the Award and the Confirming Judgment.

6 4) Appropriateness of the Offset Provision

7 If any clarification on the point needs to be made, the  
8 Judgment excepts only the \$160,000 plus 9% interest provided for in the  
9 Confirming Judgment from Mr. Cancelosi's discharge under § 523(a)(19).  
10 Mr. Cancelosi complains that I "alluded to" the damages of \$767,353.42  
11 the arbitrator found for securities law violations in the Judgment. My  
12 reference was for one purpose only: The Wilkes allegedly lost  
13 \$767,353.42, based on the securities law violations of the Arbitration  
14 Respondents, as found by the arbitrator in the Award, subject to  
15 potential recoveries from disposition of the subject securities and  
16 recoveries from the various Respondents. I included the offset provision  
17 in the Judgment so that Mr. Cancelosi would be entitled explicitly to a  
18 dollar for dollar offset against the \$160,000 plus 9% interest  
19 nondischargeable debt to the extent that the Wilkes' recoveries from the  
20 disposition of subject securities and recoveries from Respondents other  
21 than Mr. Cancelosi reduce their overall losses from their securities  
22 transactions with the Respondents to less than the \$160,000 plus 9%  
23 interest judgment debt excepted from Mr. Cancelosi's discharge.<sup>4</sup> If I  
24

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25 <sup>4</sup> The record reflects that Acuity Lending is in receivership, and  
26 the Wilkes may recover something when net receivership proceeds from  
(continued...)

1 erred in giving that equitable potential benefit to Mr. Cancelosi in the  
2 Judgment, I expect that I will be so instructed following an appeal.

3 As for Mr. Cancelosi's argument that an offset should be  
4 provided for any recovery by the Wilkes on Loan ALC061060 specifically,  
5 as Mr. Cancelosi's guarantee against loss only applied with regard to  
6 Loan ALC061060, Mr. Cancelosi has never submitted documentation for Loan  
7 ALC061060 or his guarantee for admission as evidence in this Adversary  
8 Proceeding. Consequently, I have no basis in the record to evaluate his  
9 suggestion for offset and decline to do so now.

10  
11 Conclusion

12 Based on the foregoing review and analysis of the record and  
13 relevant authorities, I will deny Mr. Cancelosi's Motion to the extent he  
14 seeks alteration or amendment of the Judgment. A separate order will be  
15 entered contemporaneously deciding all open issues raised in the Motion.

16 ###

17 cc: Richard J. Wilkes  
18 Ann K. Chapman

19  
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21  
22  
23  
24  
25 \_\_\_\_\_  
26 <sup>4</sup>(...continued)  
liquidation are distributed.